To: Federal Communication Commission (FCC)
From: Nancy Hutchinson
Date: July 15, 2017
Subject: **FCC Docket ID: 17-108; Opposition to proposed rule changes**

I strongly oppose the proposed rule changes in the FCC filing 17-108, which attempts to reverse the re-classification of broadband Internet Service as a Telecommunication Service under Title II as implemented by the FCC in 2015.

Broadband internet service has rapidly become critical for full participation in our society, our economy, our country and the world; and Title II classification is an important basis for protecting universal internet service, specific internet service consumer protection (beyond that possible via the FTC), and strong open internet rules (i.e.: Bright Line Rules, net neutrality).

Below, I provide my comments to docket 17-108, focusing on portions of the document that attempt to justify the ill-advised regulatory reversal of important broadband internet consumer protections using clearly biased or flawed arguments. OF note, one of the 3 FCC commissioners also strongly opposes the proposed changes and makes excellent point by point arguments against them (Appendix A, page 40 of 17-108). Please note that in providing my comments, I specifically ignore the many questions docket 17-108 poses to commenters about the legal basis of the reclassification because that is a topic for the courts, and the courts have already decided to uphold the legality of the 2015 rule changes.

General Comments re: biased and flawed FCC arguments:

1. First, I am concerned that the overall document reads like it was authored by an Internet Service Provider (ISP) Lobbyist. The impression of bias is further enhanced by the fact that in Sections I-IV, the ISP-aligned perspectives (which are also reflected in Chairman Pai Oral Statement, Appendix B) are repeated multiple times; however, important opposing arguments put forward by Commissioner Clyburn (Oral Statement, Appendix B) and former Chairman Tom Wheeler (summarized in his Jan 17, 2017 comments available on the FCC website: http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0113/DOC-343026A1.pdf) appear to have been downplayed or omitted. So, rather than providing a balanced "Pro and Con" justification for the FCC's proposed changes, only arguments favoring the proposed rule changes appear to have been readily incorporated.

   The result is that Sections I-IV do not adequately address the negative impacts of: removing key FCC broadband internet consumer protections; undermining important key FCC safeguards (Bright Line Rules) to maintain a fully open internet; deprioritizing innovation concerns of businesses *other than* ISPs, reduced transparency related to ISP services and charges, and eliminating an important legal framework to allow the FCC to address future broadband internet service issues as they arise.

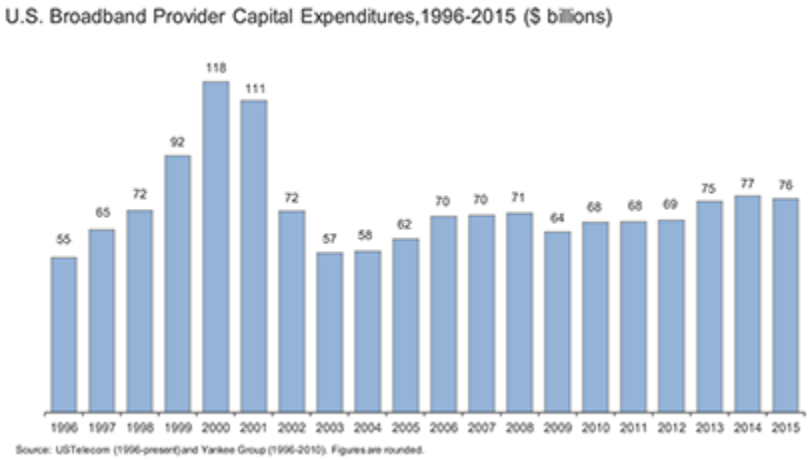
   Another example of apparent bias includes, but is not limited to the FCC's attempt to use a 20 year-old position on "light-touch" internet regulation to justify the FCC's current proposal without acknowledging

that the dramatic change in the role of the internet during this timeframe, during which the internet has rapidly become the fundamental communication platform of our time, as the telephone had in the past. Such spurious arguments seriously undermine the FCC's current position.

2. The FCC's claim that Title II classification of Broadband Internet Service as a "telecommunication service" has resulted in direct and significant reductions in Broadband Provider capital investments is NOT substantiated by the data referenced. For example, the FCC, and Chairman Pai in his Oral Statement (Appendix B) reference a limited, highly flawed, parsed, retrospective survey of the financial statements of a subset US Broadband Internet Providers, authored by a Mr. Singer, over an extremely short time period (2014-2016) to claim that "domestic broadband capital expenditures decreased by 5.6%, or $3.6 billion between 2014 and 2016, the first two years of the Title II era."; and then incorrectly conclude that the apparent decrease is a direct effect of the Title II reclassification. However, the flawed data referenced does NOT support the FCC's claims and conclusions for a number of reasons:
    - Mr. Singer, the survey's sole author, limited his US broadband provider capital expenditure ("capex") survey to only the 3 years 2014-2016, included only 12 out of 24 publicly traded broadband providers, did not address inherent year to year variability in the combined data, and selectively eliminated from consideration a subset of capex expenditures without adequate justification.

      In contrast, **Figure 1** shows a more comprehensive, related survey conducted by the Broadband Association USTelecom that spanned 20 years from 1996-2015. Please note that there is clear year-to-year variability, in addition to apparent upward or downward trends, that put into question the relevance of the small changes claimed by Mr. Singer's limited analysis. Importantly, please note that 2014 was the highest capex investment year since 2001; and 2015 was the SECOND highest capex investment year during that same timeframe.

      Figure 1:

      The fact that there is year-to-year variability in the combined annual capex investment data means that any small change observed from year to year is only meaningful if it can be demonstrated to be statistically significant. Nor can it be attributed to any specific cause.

- In Mr. Singer's more limited survey, which includes only 2014-2016 information, and only 12 broadband companies, he claims there is a small dip in overall "capex" spending in the sector between 2014 and 2016, while also acknowledging that this "apparent" dip is driven primarily by one company, AT&T, the largest of the ISPs. However, this "apparent" dip in AT&T investment claimed by Mr. Singer needs to be put into context.

  First, it is important to note that in 2015 AT&T acquired DIRECTV and some Mexican cellular properties, for which Mr. Singer "adjusted" AT&T's reported capex in 2015 and 2016 by $1.875 and $3.75, respectively. Mr. Singer's proposed "adjustments" reduced the level of AT&T's broadband capex investments that he incorporated into his capex survey from $19.2 billion to $17.3 billion in 2015, and in from $21.5 billion to $17.8 billion in 2016 – and which resulted in nearly the *entire* decrease in capex investment in the 12 company capex survey performed by Mr. Singer. It is highly questionable whether Mr. Sanger's capex "adjustments" were justified. Both of **ATT's two large, strategic, one-time acquisitions** in 2015 supported their US business: by purchasing DirecTV, ATT added US new TV services; and by purchasing Mexican cellular properties, ATT enhanced its "North American" cellular coverage for US mobile users.

  Thus, Mr. Singer's analysis should not be used at "face value" to support the claim that the FCC Title II reclassification resulted in a statistically significant decline in capital expenditures of the entire sector of US Broadband providers in 2015 and 2016. In fact, if one were to remove AT&T from Mr. Sanger's 12 company analysis, the results would be the reverse – and demonstrate a 3.8% domestic capex increase in 2015 versus 2014 (the highest level of capex since 2001) and no significant change in 2016 capex relative to 2014.

  Importantly, Mr. Singer admits that his AT&T analysis **did not necessarily support the conclusion that Title II re-classification caused his observed AT&T the capex reduction** (even with his inappropriate "adjustments")**, only that his observed reduction was contemporaneous with it** (https://haljsinger.wordpress.com/2017/02/10/tracing-atts-capital-expenditure-over-time/). It is equally likely that Mr. Singer "adjustments" were inappropriate; or that Mr. Singer's extremely short analysis (2014-2016) was skewed due to the two large, one-time strategic business capital investments occurring at ATT in 2015. The latter explanation may be most likely if one considers that the fact that many other ISP's either increased or maintained their capex over the same time period.

  Finally, it must be noted that Hal Singer has served as a paid consultant, or testifying expert, for two of the largest US ISP providers, AT&T and Verizon, so that his questionable methodology and conclusions must be viewed in light of his potential "conflict of interest".

3. Based on my reading of docket 17-108, including Chairman Pai's oral statement, it appears that FCC's recommendation are biased because views and data that support their recommendations are readily accepted without adequate scrutiny (per Mr. Singer's analysis above), while all opposing views and data are actively resisted or dismissed. While Chairman Pai touts that the FCC is being transparent as to what

they are doing and why, unless the FCC acts in an unbiased manner and directly addresses the concerns of all stakeholders (not just ISPs) – then the overall outcome will be to undermine the credibility of the FCC and its decision.

Other studies referenced by the FCC also have significant flaws and do not support the FCC's conclusions that Title II classification of Broadband Internet Service as a "telecommunication service" has resulted in direct and significant reductions in Broadband Provider capital investments; for example:

- Another study cited by the FCC assessed only 4 out of 24 US broadband internet providers (as part of a completely different type of analysis), so cannot be viewed as accurately representing capex changes in the overall sector.
- Another study compared the capex investment by US Broadband providers versus other industry sectors over time, the results of which hypothesized that the reduction in Broadband capex investment began in 2011, not 2015.
- Note, this study also states that retrospective survey's such as Mr. Singer's cannot be used to claim cause and effect changes in US Broadband capex investments.

In summary , the FCC's conclusion that type II reclassification was directly responsible for a significant (5.6%) reduction in US Broadband provider capital expenditure between 2014 and 2016 is NOT supported by any of the references cited. In contrast, upon closer examination of the data cited, one could make a more reasonable argument that the capex of many US ISP providers remained unchanged or increased between 2014 and 2016.

4. I am also concerned that the FCC describes plans to conduct a "credible cost-benefit analysis" (not yet completed) to drive the FCC's policy decision regarding whether to reverse the Title II order (Chairman Pai, oral comments). First, I would question the objectivity of any such "economic analysis", in part because of the biased approach taken to justify the Title II classification reversal itself (as highlighted by the flawed analyses above) and because it is unclear whether there would be adequate public/unbiased comment on the design, methods, data sources and assumptions that would go into such an analysis before the FCC used it to justify its final decision. Any proposal to apply a "credible cost-benefit analysis" must undergo the a similar public comment process before implementation.

   I also question the value of the FCC using any "economic analysis" of a *future* that they cannot realistically predict to drive critical decisions regarding the classification of broadband internet service under Title II, rather than addressing *existing fundamental risks* to universal, open broadband internet service. What the FCC should be focusing on is ensuring "*that one of the most inclusive, enabling, empowering platforms of our time continues to be one where our applications, products, ideas and diverse points of view have the exact same chance of being seen and heard by everyone, regardless of our class, race, economic status or where we live*" (quote from Commissioner Clayburn).

5. Please note that the proposed Title II classification reversal also appears to go against some of the Strategic Goals of the FCC , and ignore other benefits (some include excerpts from other comments):

- Title II protects competitive broadband service providers' ability to attach their infrastructure to poles.
- The FCC took steps last year to expand the Lifeline program, which traditionally provides subsidies for low-income Americans to access telephone service, to now provide subsidies for internet access. The expansion allows eligible telecommunications carriers including broadband-only providers to offer subsidized broadband services to low-income consumers. However, if broadband were to lose its Title II classification, certain providers may no longer qualify to offer subsidized broadband services.
- Despite the Administration's efforts to remove privacy rules from broadband networks, Title II still provides the FCC with a statutory framework to enforce broadband privacy, just as it did the moment the FCC reclassified broadband. Consumers can file complaints before the FCC citing egregious behavior by their broadband service provider's control over their data in violation of Section 222. Therefore, the Commission can still bring enforcement actions against broadband service providers on a case-by-case basis, which it has done in the past. In addition to enforcement actions, the Commission can release guidelines and best practices for broadband providers to follow in protecting consumer data. Section 222 also gives the FCC authority to promulgate new broadband privacy rules in the future - an authority other agencies like the Federal Trade Commission lack.
- Privacy is a protection consumers have come to expect regardless of if they are using a telephone network or a broadband network. As consumers continue to rely on the internet for everyday activities such as applying for jobs, checking medical records, and completing homework, protecting their online privacy has never been more important. The FCC must use its Title II authority to continue protecting consumer broadband privacy.
- In addition to universal service and privacy, there are other consumer protections Title II requires from broadband networks:
    - Section 255 ensures consumers with disabilities have equitable access to telecommunications networks. With Title II classification, broadband providers must make their networks compatible for consumers with disabilities. Without Title II, these protections would not exist for consumers with disabilities.
    - Consumers also expect their bills for accessing communications networks to be transparent without hidden fees or unauthorized charges. Under Section 201, the Commission enacted truth-in-billing rules requiring telecommunications carriers to disclose all fees and surcharges associated with their service. With Title II classification, the FCC applied enhanced transparency rules to broadband networks (with exceptions made for small broadband service providers). These rules require broadband providers to disclose monthly service charges, other fees and surcharges, and data caps and other allowances. Without these rules, consumers would not be fully informed to all the fees and surcharges associated with their broadband service.
- Title II classification is critical for protecting an open internet, but it is also just as important for preserving our values of service to all Americans, including universal service and consumer protection. Broadband has the power to transform people's everyday lives. Title II classification of

broadband must remain in place to continue protecting the fundamental values of our communications systems.

Specific Comments to proposed changes per FCC filing 17-108:

- **FCC Proposal to Remove 8.11: I object to removal of this very important section, as this change is not adequately supported by the data cited, and will harm consumer protections, per comments above:**

Section 8.11 as of 2015 should be retained:
§ 8.11 No unreasonable interference or unreasonable disadvantage standard for Internet conduct.
Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

[80 FR 19848, Apr. 13, 2015]
Broadband Internet access service. A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this part. 47 CFR § 8.2

Reasonable network management. A network management practice is a practice that has a primarily technical network management justification, but does not include other business practices. A network management practice is reasonable if it is primarily used for and tailored to achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service. 47 CFR § 8.2

The above in the context of 47 CFR 52.5 - Definitions.

(h)*Telecommunications.* "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(i)*Telecommunications carrier or carrier.* A "telecommunications carrier" or "carrier" is any provider of telecommunications services, except that such term does not include aggregators oftelecommunications services (as defined in 47 U.S.C. 226(a)(2)). For the purposes of this part, the term "telecommunications carrier" or "carrier" includes an interconnected VoIP serviceprovider.

(j)*Telecommunications service.* The term "telecommunications service" refers to the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used. For purposes of this part, the term

"telecommunications service" includes interconnected VoIP service as that term is defined in 47 U.S.C. 153(25).

- The FCC proposal to change the following definitions per filing 17-108**: I object to the proposed FCC changes to the definitions below, as they are not adequately supported by the data cited and may harm consumer protections per comments above.**

1. Current definition as of 2015 should be retained:

Commercial mobile radio service. ***A mobile service that is:***

(a)

(1) provided for profit, ***i.e.***, with the intent of receiving compensation or monetary gain;

(2) An interconnected service; and

(3) Available to the public, or to such classes of eligible users as to be effectively available to a substantial portion of the public; or

(b) The functional equivalent of such a mobile service described in paragraph (a) of this section, **including a mobile broadband Internet access service as defined in § 8.2 of this chapter.**

FCC filing 17-108 proposed change:
Commercial mobile radio service. * * * * * * * * (b) The functional equivalent of such a mobile service described in paragraph (a) of this section.

I specifically object to removal of bolded text in section (b) from the original 2015 definition above. The original text should be retained.

2. Current definition as of 2015 should be retained:

Interconnected Service. A service:

(a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from other users on the public switched network; or

(b) *For which a request for such interconnection is pending pursuant to section 332(c)(1)(B) of the Communications Act, 47 U.S.C. 332(c)(1)(B). A mobile service offers interconnected service even if the service allows subscribers to access the public switched network only during specified hours of the day, or if the service provides general access to points on the public switched network but also restricts access in certain limited ways. Interconnected service does not include any interface between a licensee's facilities and the public switched network exclusively for a licensee's internal control purposes.*

FCC filing 17-108 proposed change:
Interconnected Service. A service:

> (a) That is interconnected with the public switched network, or interconnected with the public switched network through an interconnected service provider, that gives subscribers the capability to communicate to or receive communication from **all** other users on the public switched network; or
> (b) * * *

The exact 2015 definition should be retained, thus, the proposed addition of the word "all" in the new definition should be removed.

3. Current definition as of 2015 should be retained:

Public Switched Network. **The network that includes** any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that uses the North American Numbering Plan, **or public IP addresses**, in connection with the provision of switched services.

FCC filing 17-108 proposed change:
Public Switched Network. Any common carrier switched network, whether by wire or radio, including local exchange carriers, interexchange carriers, and mobile service providers, that use the North American Numbering Plan in connection with the provision of switched services.

The 2015 full definition should be retained, including the bolded and highlighted text above.